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No. 00- 00 896

In the
Supreme Court of the United States

JOHN O'BRIEN,
Petitioner

v.

THE UNITED STATES,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court in *Olano* and *Johnson* specifically left open the question whether, under Fed.R.Crim.P. 52(b), special considerations apply "where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *United States v. Olano*, 507 U.S. 725, 734-35 (1993). The question presented is:

> In applying the plain error standard of Rule 52(b) to a claim of legal error that became clear only under a supervening decision that changed the law after the case was on appeal, should the government bear the burden of establishing that the error did not prejudice the defendant?

PARTIES TO THE PROCEEDING

In addition to the petitioner, the other defendant-appellants in the court below were Eric Schmidt, Michael O'Keefe, Sr., Gary Bennett and Paul Schmitz.

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The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and is reprinted as Appendix A. The order of the Court of Appeals denying rehearing and rehearing en banc is unreported and is reprinted as Appendix B.

JURISDICTION

The judgment of the court below was entered on August 11, 2000. A timely petition for rehearing was denied on September 14, 2000. App. 32a.[1] This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Rule 52 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

This case presents the question of who bears the burden of proving that a plain error has affected the substantial rights of a criminal defendant when that error became plain only after trial, due to a supervening judicial decision that changed the previously settled rule of law. In such circumstances, where the defendant could not reasonably have been expected to raise what would have been an unsupported objection to the legal error

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[1] References to the appendices bound with this volume will be styled "App.___a."

during the trial, should the defendant be required to prove that the admitted legal error has indeed prejudiced him? Or, given that the prosecution always has the burden of proving the existence of every element of a crime beyond a reasonable doubt, should it be the government's burden to prove that the trial court's plain error did *not* prejudice the defendant? The Courts of Appeals have held that this important question was expressly left unanswered in *United States v. Olano*, 507 U.S. 725 (1993), and they have given conflicting answers to the question.

Petitioner John O'Brien and his co-defendants were indicted and tried for conspiracy to commit fraud, wire and mail fraud, and money laundering in connection with an allegedly fraudulent insurance scheme. App. 2a. The entire indictment depended upon what the court below called "the overarching count 1 conspiracy" with its allegations of misrepresentations and omissions involving the management and liquidation of a failed insurance company. App. 2a. At the time of trial in March 1996, which was several years before the decision in *United States v. Neder*, 527 U.S. 1 (1999), it was settled law that materiality of misrepresentations or omissions was not an element of wire or mail fraud. *See Neder*, 527 U.S. at 25; Fifth Circuit Pattern Jury Instructions: Criminal, Instruction No. 2.54 (1990); *Laird v. Integrated Resources, Inc.*, 897 F.2d 826, 839 & n. 53 (5th Cir. 1990). As the court below noted, this rule of law changed "after the trial of the pending matter." App. 15a. Consequently, a materiality instruction was not requested by either party and the "jury was not instructed on the element of materiality." App. 9a.

Petitioner was convicted in 1996 and, after a series of post-trial motions and appeals, sentenced in 1999 to 121 months in prison. Shortly thereafter, this Court held for the first time in *United States v. Neder*, 527 U.S. 1, 25 (1999), that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." On direct appeal from his conviction, petitioner invoked *Neder* and challenged as plain error the failure

to include materiality as an element of the offense in the instructions to the jury. In a 32-page opinion, the court below rejected this argument (and others) and affirmed the conviction.

The court below agreed that the decision in *Neder* changed the governing law in the Fifth Circuit and that the new rule governed this appeal. App. 9a, 15a. The court below further held that the "jury was not instructed on the element of materiality." App. 9a. The court found that, although the word "material" appeared once or twice in the instructions, "the jury charge did not plainly explain that materiality of falsehood is a separate element of the mail and wire fraud statutes." App. 16a. *See also id.* at 16a (discussing "omission of the materiality element of the crime in the jury charge"). The Court of Appeals thus held that petitioner had met the first two requirements for reversal under Fed.R.Crim.P. 52(b) established in *United States v. Olano*, 507 U.S. 725, 732 (1993): there was (1) judicial error that was (2) plain at the time of direct appeal. App. 16a.

However, in the face of a contrary line of authority from other circuits, *see, e.g., United States v. Viola*, 35 F.3d 37 (2d Cir. 1994), *cert. denied*, 513 U.S. 1198 (1995), and despite the fact that the petitioner could hardly be faulted for not raising at trial a legal objection that did not exist at that time, the Fifth Circuit anachronistically treated the *Neder* error as having been forfeited by petitioner. App. 16a ("Defendants did not object to the trial court's failure to so instruct the jury" on materiality). The court below therefore expressly imposed the burden of proving prejudice from this error on the petitioner and his fellow defendants: "Defendants do not establish reversible error under the plain error standard." App. 16a. "Defendants do not show that the inclusion of a materiality instruction in the already complex charge would have altered the outcome of the jury's deliberations." App. 16a-17a.

Under the Fifth Circuit's own analysis of the charges and the evidence, the placement of this burden on the petitioner rather than the government was decisive. The court below found that the evidence on materiality "was disputed" (App. 9a), and that, on the specific issue of materiality, the "defendants put on a vigorous defense." App. 17a. The Court of Appeals further found that defendants "present[ed] an alternative version of events that is completely at odds with the government's theory of the case" and that negated the materiality of the alleged falsehoods and omissions. App.10a. The court concluded that this interpretation of the evidence "is not wholly implausible" (App. 11a), but nevertheless held that "a rational jury simply was not required to accept [defendants'] explanation" for the events of this case. App. 12a .

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS A SUITABLE VEHICLE FOR RESOLVING A RECURRING QUESTION LEFT OPEN BY THIS COURT IN *OLANO*, AND ON WHICH THE COURTS OF APPEALS ARE DIVIDED: WHETHER THE GOVERNMENT OR THE DEFENDANT BEARS THE BURDEN OF PERSUASION AS TO PREJUDICE WHEN AN ERROR WAS UNCLEAR AT THE TIME OF TRIAL BUT BECAME CLEAR ON APPEAL DUE TO AN INTERVENING CHANGE IN THE LAW.

A. The Question Presented Was Specifically Left Open By This Court in *Olano*.

In *United States v. Olano*, 507 U.S. 725 (1993), this Court established the rules for applying Fed.R.Crim.P. 52(b). There must be (1) legal error, (2) that is plain, and (3) that affects substantial rights — meaning "the error must have been prejudicial." 507 U.S. at 733-34. Finally, relief is within the discretion of the Court of Appeals and may be granted, even if

there is not a question of actual innocence, so long as the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." 507 U.S. at 736.

With respect to the third prong, the Court noted that the usual rule is that "Rule 52(b) *normally* requires the same" harmless error inquiry as Rule 52(a), 507 U.S. at 734 (emphasis added), with one important difference: the defendant rather than the Government bears the burden of persuasion with respect to prejudice. "*In most cases*, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial." *Id.* (emphasis added). The Court's hedge with respect to the placement of the burden was explicit and was repeated: "*Normally, although perhaps not in every case,* the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)." *Id.* at 735 (emphasis added).

Thus, *Olano* expressly left open the question of which party bears the burden of persuasion when the defendant has committed no forfeiture and the appeal is based not on an error that the defendant could have objected to at trial, but on an error that was made clear only after trial by a change in the law: "We need not consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Id.* at 734. The lower federal courts have likewise read *Olano* as leaving this question unresolved:

> Generally, in plain error review under Rule 52(b), as contrasted with harmless error review under Rule 52(a), the defendant bears the burden of persuasion as to prejudice. [*Olano*, 113 S.Ct.] at 1778. However, the Supreme Court in *Olano* specifically left open the question which now confronts us: namely, whether under Rule 52(b) special considerations apply "where

> the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Id.* at 1777; *see also id.* at 1777-78.

United States v. Viola, 35 F.3d 37, 41 (2d Cir. 1994), *cert. denied*, 513 U.S. 1198 (1995).

This question also went unresolved in this Court's most recent decision on Rule 52(b), *Johnson v. United States*, 520 U.S. 461 (1997). In *Johnson* the Court held, as had the Second Circuit in *Viola*, 35 F.3d at 42, that Rule 52(b) is the sole source of appellate authority to correct errors to which no objection was raised at trial. 520 U.S. at 466. *Johnson* further held, as had *Viola*, 35 F.3d at 42, that whether an error is plain is to be judged under "current law" at the time of direct appeal, even if the law has changed since the time of trial. 520 U.S. at 467-68. But the *Johnson* Court expressly declined to decide whether prejudice from the error had been shown, nor did it address which party bears the burden on prejudice in cases where the law changed while the conviction was on appeal. The Court found it unnecessary to reach those questions because, in any event, the case could not meet the final requirement of *Olano* because "the evidence supporting materiality was 'overwhelming.'" 520 U.S. at 469-70. "Materiality was essentially uncontroverted at trial and has remained so on appeal." *Id.* at 470. *See also id.* at 470 ("petitioner has presented no plausible argument that the false statement under oath for which she was convicted . . . was somehow not material"); *id.* at 470 n.2 (the "sum total of petitioner's argument at trial concerning materiality" was a single "conclusory sentence" asking the court for a directed acquittal).

B. The Courts of Appeals Are Divided On This Question.

Although this Court has never decided this particular burden-of-persuasion issue, several courts of appeals have — in

conflicting ways. The leading authority is the Second Circuit's decision in *United States v. Viola*:

> Generally, in plain error review under Rule 52(b), as contrasted with harmless error review under Rule 52(a), the defendant bears the burden of persuasion as to prejudice. [*Olano*, 113 S.Ct.] at 1778. However, the Supreme Court in *Olano* specifically left open the question which now confronts us: namely, whether under Rule 52(b) special considerations apply "where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Id.* at 1777; *see also id.* at 1777-78. We think that special considerations do apply. ***When a supervening decision alters settled law, the three Olano conditions for reviewing plain error under Rule 52(b) still must be met, but with one crucial distinction: the burden of persuasion as to prejudice (or, more precisely, lack of prejudice) is borne by the government, and not the defendant.***
>
> The reason for this distinction emerges when we contrast the case involving a supervening decision with the ordinary case in which plain error review is invoked. In the ordinary case, an event, such as the issuance of a jury instruction, occurs which is clear error under the law at the time of trial. Because the law is clear, the defendant is on notice of the duty to object. If he fails to object, he not only forfeits his legal right to have the error corrected, but he impedes the judicial process by failing to prompt the trial judge to make timely correction of the error. [*Olano*, 113 S.Ct.] at 1776. It is proper to hold a defendant accountable for that failure, and to deter defendants from strategically withholding an objection in order to seek reversal on

> appeal. The defendant rightly bears the burden of proving prejudice in the ordinary case.
>
> The situation is different when a supervening decision alters settled law. A defendant clearly has no duty to object to a jury instruction that is based on firmly established circuit authority. He cannot be said to have "forfeited a right" by not making an objection, since at the time of trial no legal right existed. If we were to penalize defendants for failing to challenge entrenched precedent, we would be insisting upon an omniscience on the part of defendants about the course of the law that we do not have as judges. Imposing such a duty would only encourage frivolous objections and appeals. *When the source of plain error is a supervening decision, the defendant has not been derelict in failing to object at trial, and there is thus no cause to shift the burden of proving prejudice to the defendant. In this special context, as in harmless error review under Rule 52(a), the government must show that the error did not affect the defendant's substantial rights.*

35 F.3d at 41-42 (emphasis added). *See also United States v. Ballistrea*, 101 F.3d 827, 835 (2d Cir. 1996), *cert. denied*, 520 U.S. 1150 (1997) (applying this reasoning and holding that "the Government has failed to show that Ballistrea was not prejudiced by the District Judge's clear error in failing to instruct the jury on an essential element of the ... offense.").

In *United States v. Baumgardner*, 85 F.3d 1305, 1309 n. 2 (8th Cir. 1996), the Eighth Circuit found the *Viola* analysis "persuasive" and agreed that it made sense to place the burden on the government to demonstrate prejudice, "recognizing that a defendant should not be penalized for failing to challenge entrenched precedent." But the court decided the case on other

grounds and reserved "the issue of burden-shifting for another day." *Id.*[2]

The *Viola* rule continues to be applied in the wake of this Court's decision in *Johnson*. *See, e.g., United States v. Knoll*, 116 F.3d 994, 1001 (2d Cir. 1997), *cert. denied*, 522 U.S. 1118 (1998); *United States v. Malpeso*, 115 F.3d 155, 165 (2d Cir. 1997). The Second Circuit's fair and eminently sensible rule is entirely consistent with this Court's analysis in *Johnson* and with the policies that animate Rule 52's requirement of timely objection to trial court error.

The procedural vice at which Rule 52(b) is directed was identified in *United States v. Young*, 470 U.S. 1 (1985): "'[C]ounsel for the defendant cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time'" on the supposed error and claim prejudice. *Id.* at 16 n. 13 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940)). This Court has repeatedly cautioned that courts applying Rule 52(b) must take care not to "skew the Rule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.'" *Young*, 470 U.S. at 15 (quoting *United*

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[2] In *United States v. Wiles*, 102 F.3d 1043 (10th Cir. 1996) (en banc), *vacated and remanded sub nom. United States v. Schleibaum*, 522 U.S. 945 (1997), the dissenters embraced the *Viola* analysis, reasoning that, "given the unique circumstance created in these cases as a result of an intervening change in the settled law of this circuit, I would require the government to bear the burden of proving the absence of prejudice because the defendants' failure to object was the result of their reliance upon settled law."). 102 F.3d at 1072 (Briscoe, J., joined by Kelly and Henry, JJ., dissenting). The majority opinion in *Wiles* was vacated by this Court in the wake of *Johnson*. Upon remand, there was no occasion to reach the burden issue because, just as in *Johnson*, the evidence of materiality was "unrebutted" and "overwhelming." 130 F.3d 947, 949-50 (10th Cir. 1997)(en banc).

States v. Frady, 456 U.S. 152, 163 (1982)). *See also Johnson*, 520 U.S. at 466 (same); *Olano*, 507 U.S. at 731 (purpose of 52(b) is to encourage "timely assertion of the right before a tribunal having jurisdiction to determine it").

This admonition has been followed by those Courts of Appeals that have shifted the burden to the government when the error was created by a change in the law. The Eighth Circuit has recognized that Rule 52(b) was "designed to encourage a defendant to raise objections during the proceeding where they might be corrected, rather than strategically to withhold an objection as a basis of appeal." *Baumgardner*, 85 F.3d at 1308. And the Second Circuit has held that, if there is a legal basis for a particular objection, the defendant "is on notice of the duty to object. If he fails to object, he not only forfeits his legal right to have the error corrected, but he impedes the judicial process by failing to prompt the trial judge to make timely correction of the error." *Viola*, 35 F.3d at 42. Therefore, "[i]t is proper to hold a defendant accountable for that failure, and to deter defendants from strategically withholding an objection," by imposing on the defendant "the burden of proving prejudice in the ordinary case." *Viola*, 35 F.3d at 42.

But this sensible policy against the tactic of "sandbagging" is simply not implicated where, as in this case, the legal basis for the asserted error did not exist at the time of trial. It makes no sense to penalize a defendant for failing to raise a particular objection at trial when the law at the time of trial did not support such an objection, and may even have foreclosed it. In such circumstances, a defendant "cannot be said to have 'forfeited a right' by not making an objection, since at the time of trial no legal right existed." *Viola*, 35 F.3d at 42. Since the defendant in such a case is innocent of any default, forfeiture or other procedural lapse, there is no justification for relieving the government of its burden of demonstrating that the conviction it obtained *without having to prove every element of the offense* did

not prejudice the defendant. To be sure, the prosecution in such circumstances may not have committed any procedural breach either, so there is no government misconduct to deter. But imposing this burden of proof on the government cannot be deemed unreasonable or unfair, given that the "prosecution bears the burden of proving *all the elements of the offense charged* and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish *each* of those elements." *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (emphasis added).

Placing the burden on a faultless defendant would not only be unjust and inconsistent with the policies animating Rule 52, it would also give defendants a bizarre incentive to waste the court's time. "[T]o require a defendant to raise all possible objections at trial despite settled law to the contrary would encourage frivolous arguments, impeding the proceeding and wasting judicial resources." *Baumgardner*, 85 F.3d at 1309. *See also Viola*, 35 F.3d at 42 ("Imposing such a duty would only encourage frivolous objections and appeals."); *Malpeso*, 115 F.3d at 165 ("'When the source of plain error is a supervening decision, the defendant has not been derelict in failing to object at trial'").

Indeed, in *Johnson* itself this Court adopted this reasoning in holding that plain error is to be assessed as of the time of the appeal. The government had argued in *Johnson* that, if petitioner wanted to reserve its rights, "petitioner should have objected to the [trial] court's deciding the issue of materiality, even though near-uniform precedent both from this Court and from the Courts of Appeals held that course proper." 520 U.S. at 467-68. This Court rejected that position, noting the perverse incentive it would create: "such a rule would result in counsel's inevitably making a long and virtually useless list of objections to rulings that were plainly supported by existing precedent." 520 U.S. at 468.

As the Second Circuit stressed in *Viola*, this burden-shifting rule is very narrow:

> [T]he rule that the burden rests on the government to show that plain error in light of a supervening decision did not affect substantial rights applies only when the supervening decision alters a settled rule of law in the circuit. When a point of law has not been addressed or has been inconsistently declared in this circuit, the general plain error rule applies: a defendant has a duty to object to an unfavorable application of the law.

35 F.3d at 42.

Despite this Court's caveat in *Olano* and its concern in *Johnson* about perverse incentives, and in the face of the Second Circuit's contrary authority, the court below expressly imposed the burden of proving prejudice on the defendants even when a supervening decision changes the law. App.16a ("Defendants do not establish reversible error under the plain error standard."); App. 16a-17a ("Defendants do not show that the inclusion of a materiality instruction . . . would have altered the outcome of the jury's deliberations.").

The Fifth Circuit thereby deliberately widened the already existing split among the Courts of Appeals. In *United States v. Kramer*, 73 F.3d 1067 (11th Cir.), *cert. denied*, 519 U.S. 1011 (1996), in addressing a failure to submit the issue of materiality to the jury, the Eleventh Circuit expressly rejected the Second Circuit rule and imposed on defendant the burden of "persuad[ing] us that the error affected his substantial rights." 73 F.3d at 1074 n.17. *See also id.* at 1078 (Barkett, J., concurring specially) (arguing that *Viola* rule is correct but reaching same judgment as majority on the ground that the government carried its burden of proof as to lack of prejudice).

C. This Case Is A Suitable Vehicle For Resolving The Important Circuit Conflict On This Recurring Issue.

Many cases involving a supervening change in the law that renders a trial court's handling of an element of the offense plain error are poor vehicles for resolving the burden of proof issue. This is usually for the simple reason that placement of the burden could not even arguably have made a difference in those proceedings because the evidence on the erroneously omitted element was undisputed. Thus, as noted above, in *Johnson* this Court chose to pass over the question whether the defendant had been prejudiced by the plain error — and therefore had no occasion to decide who had the burden of proving (or disproving) prejudice — because the evidence supporting materiality was "overwhelming" and "uncontroverted." 520 U.S. at 469-70. *See supra* page 6.[3]

The case at hand, in bold contrast, is an entirely suitable vehicle for resolving the question left open by *Olano* because materiality was hotly contested both at trial and on appeal. The court below found that, with specific reference to the issue of materiality, the "defendants put on a vigorous defense." App. 17a. The Fifth Circuit further found that petitioner and the other defendants had "present[ed] an alternative version of events that is completely at odds with the government's theory of the case" and that negated the materiality of the alleged falsehoods and

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[3] The same holds true for cases remanded for reconsideration in light of *Johnson*. *See, e.g., United States v. Schleibaum*, 130 F.3d 947, 949-50 (10th Cir. 1997) (en banc) (upon remand, no occasion to reach burden issue because evidence of materiality was "unrebutted" and "overwhelming") (discussed in note 2, *supra*); *United States v. Keys*, 133 F.3d 1282, 1286-87 (9th Cir. 1998) (en banc) (upon remand, court held that (1) question of materiality had been uncontested by defendant and (2) any argument that defendant's falsehoods were not material would have been "frivolous"), *amended in other respects*, 153 F.3d 925 (9th Cir. 1998) (en banc), *cert. denied*, 525 U.S. 891 (1998).

omissions. App. 10a. The Court of Appeals acknowledged that this interpretation of the evidence "is not wholly implausible," but nevertheless held that "a rational jury simply was not required to accept [defendants'] explanation" for the events of this case. App. 11a, 12a.

Yes, there was evidence of materiality of the defendants' falsehoods or omissions, but unlike *Johnson* and the other decisions, here that evidence was not overwhelming and was vigorously disputed. Therefore, this is a case in which placement of the burden of proof on prejudice relating to that legal error could not be ignored by a reviewing court. And the court below put that burden on the petitioner. The court below did *not* conclude that the jury *would* have convicted even if the proper instruction had been given — it said only that the jury "*could* have." App. 9a, 12a, 13a (emphasis added). The court did not hold that no rational jury could have accepted the petitioner's defense if properly instructed — it held only that a rational jury simply "was not required to accept" that defense. App. 12a.

Petitioner contends that the court below thus put the burden on the wrong party. At trial, the prosecution had the burden of proving, beyond a reasonable doubt, every element of the offense charged. And on direct appeal, after erroneous jury instructions, the government should have been required to prove that no rational, properly instructed jury could have acquitted petitioner. The government should have been required to prove that the failure to instruct the jury properly did not prejudice the petitioner.

But regardless whether petitioner is correct about that proposition, it is undeniable that the question of where to place the burden of persuasion on that issue was left open by this Court in *Olano* and now sharply divides the Courts of Appeals. Because the question of materiality was vigorously disputed

here, this case is an appropriate vehicle for resolving the question presented.

CONCLUSION

Letting this question of burden of proof percolate longer in the lower federal courts would shed no new light on this already critical problem — a problem that will reoccur in a certain number of pending criminal appeals every time a prevailing rule of criminal procedure is changed by an intervening appellate decision either in this Court or one of the circuit courts. A writ of certiorari is in order.

Respectfully submitted,

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November 2000

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APPENDIX A

U.S. COURT OF APPEALS
FILED
AUG 11 2000
CHARLES R. FULBRUDGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30082

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

versus

ERIC SCHMIDT; MICHAEL O'KEEFE, SR.;
JOHN OBRIEN; GARY BENNETT,

Defendants-Appellants
Cross-Appellees,

PAUL SCHMITZ,

Defendant-Appellant.

Appeal from the United States District Court for
the Eastern District of Louisiana
(USDC No. 95-CR-106-2-S)

Before REAVLEY, DAVIS and BARKSDALE, Circuit Judges:*

REAVLEY, Circuit Judge:*

Five defendants appeal their convictions for conspiracy, mail and wire fraud, and money laundering in connection with a fraudulent insurance scheme. Michael O'Keefe, Eric Schmidt, John O'Brien, and Gary Bennett were convicted on the overarching count I conspiracy count and other counts. Paul Schmitz was convicted on a single mail fraud count. O'Brien also appeals his sentence, and the government cross-appeals on two sentencing matters. We affirm.

BACKGROUND

The evidence presented at trial supports the following events. O'Keefe, despite two prior fraud convictions, was selected to operate the management company of Physicians National Risk Retention Group, Inc. ("PNRRG"), a Louisiana medical malpractice insurer. The management company was named Associated Auditors (AA). Schmidt, O'Keefe's son-in-law, served as president of PNRRG. Bennett and O'Brien were also involved in the management of the PNRRG, and Schmitz was a claims manager.

PNRRG became insolvent and the state of Louisiana moved to liquidate it. The defendants arranged to have Builders and Contractors Insurance Limited (BCI), a dormant Bahamian corporation under the control of Charles Donaldson, act as a reinsurers Defendants promised that coverage of

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

PNRRG's physicians would continue and that all claims would be paid by BCI. PNRRG and the Louisiana Department of Insurance authorized the transfer of over $10 million in cash assets of PNRRG to a trust account of O'Keefe's law firm, with the funds to be held on behalf of BCI. Defendants entered into a reinsurance contract with Sphere Drake, an established reinsurance company, but this contract was canceled a few months later. The defendants failed to maintain coverage and pay claims for the insured physicians as promised.

Instead, Associated Insurance Consultants, Inc. (AIC), a company owned by defendants Schmidt, Bennett, and O'Brien, signed a secret management contract with BCI. Ultimately, over $5 million in assets of PNRRG ended up in the personal bank accounts of the Schmidt, Bennett, and O'Brien.

The five defendants were charged in a multi-count indictment which included conspiracy, wire fraud, mail fraud, and money laundering counts. Two of the main government witnesses were Donaldson and Johnny Moore, participants in the scheme.

An FBI "302 report" was prepared prior to trial. The report documented an interview of Donaldson by an FBI agent. According to the report, someone had stated that "O'Keefe suggested that BCI's shareholders meeting minutes be altered to make it appear that Donaldson had authority to enter into the PNRRG/BCI contract." At trial, Donaldson testified and the government turned the 302 report over to defendants, as required by the Jencks Act, 18 U.S.C. § 3500. The government did not ask any questions about the 302 report. However, on cross-examination, Donaldson admitted that he

had falsely accused O'Keefe of altering the minutes. Donaldson also, arguably, perjured himself at the trial by first claiming that he had altered the minutes, then stating that he could not remember if he had accused O'Keefe of altering the minutes, and finally admitting that he had falsely told the FBI that O'Keefe had suggested that the minutes be altered. Judge Sear concluded after the trial that (1) Donaldson had falsely accused O'Keefe of participating in altering the minutes, (2) the government knew about this falsehood, (3) the government had failed to notify defendants of Donaldson's falsehood, and (4) defendants were therefore entitled to a new trial. Judge Sear recused himself after granting the new trial, but later denied a motion for reconsideration. The basis of the new trial was that even though the government did not try to prove that O'Keefe had altered the minutes, Donaldson had falsely accused O'Keefe of doing so, and this lie went to the credibility of Donaldson, a key witness.

The government appealed the order for new trial, and we reversed. United States v. O'Keefe, 128 F.3d 885 (5th Cir. 1997) (O'Keefe I). We concluded that a new trial was not warranted, noting that the jury was fully informed of Donaldson's false statements, and that the government had not relied on the false statements in presenting its case. See id. at 896-98. After we remanded the case to the district court, the district court considered motions for new trial on grounds of newly discovered evidence relating to Moore and Donaldson. Donaldson had allegedly received a secret $45,000 payment from the government which contradicted the government's statement to the jury that it had offered no promises or inducements to Donaldson beyond his plea agreement. Judge Lemmon denied the new trial motions, and entered judgments of conviction and sentenced the defendants.

DISCUSSION

A. Sufficiency of Evidence

All five defendants challenge the sufficiency of the evidence. The verdict will be upheld if a rational jury could have found the essential elements of the offense beyond a reasonable doubt. See United States v. Walters, 87 F.3d 663, 667 (5th Cir. 1996). We view the evidence, including all reasonable inferences drawn therefrom and all credibility determinations, in the light most favorable to the verdict. See id.

1. Conspiracy Count

Count 1 alleged a conspiracy to commit wire and mail fraud. To sustain a conspiracy conviction under 18 U.S.C. § 371, the government must prove (1) an agreement between two or more persons, (2) to commit a crime, and (3) an overt act committed by one of the conspirators in furtherance of the conspiracy. See United States v. Gray, 96 F.3d 769, 772-73 (5th Cir. 1996). The elements of mail fraud under 18 U.S.C. § 1341 consist of (1) a scheme to defraud, (2) the use of the mails to execute the scheme, and (3) the specific intent of the defendant to commit fraud. See United States v. Salvatore, 110 F.3d 1131, 1136 (5th Cir. 1997). Wire fraud under 18 U.S.C. § 1343 can be established upon proof of (1) a scheme to defraud, and (2) the use of interstate wire communications in furtherance of the scheme. See Gray, 96 F.3d at 773. The Supreme Court has stated that because the mail and wire fraud statutes share the same language in relevant part, the same analysis applies to each. See Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987).

Defendants O'Keefe, Schmidt, O'Brien, and Bennett were convicted on the overarching conspiracy count. The indictment charged a wide-ranging scheme to use mail and wire facilities to execute a fraudulent scheme "(a) to defraud [PNRRG], its insured physicians and patients making medical malpractice claims against those physicians; (b) to obtain money and property by means of false pretenses, promises, and representations; and (c) to deprive [PNRRG] of its night to the honest services of its President, Eric Schmidt."

Evidence, some disputed and some undisputed, supports the following events and is sufficient to support the conspiracy convictions. O'Keefe, with two prior convictions, operated and owned AA, the management company of PNRRG. PNRRG had been organized by a group of physicians to provide themselves with liability insurance. AA became the management company after the Louisiana Department of Insurance (DOI) insisted that existing management be ousted in an attempt to financially salvage PNRRG.

Though PNRRG had substantial assets, it became statutorily insolvent and the DOI moved to liquidate it. The DOI had decided to place PNRRG in liquidation by late 1991. Prior to this decision the DOI had placed PNRRG in "conservation" under Louisiana law, through a judicial order by a state court. O'Keefe and Schmidt advised the PNRRG board to liquidate PNRRG and transfer the assets to a new insurer.

The defendants arranged to have BCI, a Bahamian corporation under the control of Charles Donaldson, act as a reinsurers BCI was a dormant Bahamian insurance company at the time. An Agreement of Reinsurance between BCI and PNRRG was approved by the PNRRG board and the DOI.

Donaldson had worked with Bennett in the past. Donaldson pleaded guilty to misrepresenting his authority to execute the reinsurance agreement. Defendants falsely promised that coverage of PNRRG's physicians would continue and that all claims would be paid by BCI.

The board of PNRRG and the DOI authorized the transfer of over $10 million in cash assets of PNRRG to BCI, but the assets were to be held on American soil in a trust account of O'Keefe's law firm. As promised, defendants entered into a reinsurance contract with Sphere Drake Insurance p.l.c., an established British reinsurance company, but this contract was canceled a few months later, at O'Brien's suggestion, without notifying the DOI or the insured physicians or their agents. The district court concluded, properly under the evidence, that "a reasonable jury could have found that the defendants created a false impression that Sphere Drake was covering the risks when, in fact, the contract was canceled and the defendants received substantial profits realized by the cancellation."

The defendants failed to maintain coverage and pay claims for the insured physicians as promised, and misrepresented that certain claims would be the reinsurers' responsibility. Instead, AIC, a company owned by defendants Schmidt, Bennett, and O'Brien, signed a secret management contract with BCI. O'Keefe acted as AIC's attorney. According to Bennett, AIC was originally formed by O'Keefe and Schmidt. Under the AIC/BCI agreement, 90 percent of any profit to BCI flowed to AIC. Schmidt, Bennett and O'Brien received over $5 million in "profits" from the O'Keefe trust account, after these funds passed through an account in the Bahamas. Funds went from the O'Keefe trust account to a Bahamian company called "Captive Managers," a sole proprietorship owned by

Donaldson, who received a fee of $150,000. The funds were then almost immediately wired back to a bank account in New Orleans and largely distributed to Schmidt, Bennett, and O'Brien. District judge Lemmon concluded that defendants used AIC as a vehicle to divert PNRRG's funds "in a bogus reinsurance agreement" with BCI. The district court fairly summarized the evidence in concluding that defendants paid Donaldson "to sign agreements and other documents on behalf of [BCI] and to funnel [$5.6 million] from the United States through [a Bahamian bank account] and to return the funds to the AIC bank account in New Orleans."

Defendants failed to disclose to the DOI and the PNRRG board that they would realize millions of dollars through their management of the reinsurance plan, and at one point denied that they would benefit financially from their efforts for the physicians.

Of the $10.7 million transferred to the O'Keefe trust account as the sum necessary to fund the reinsurance plan, defendants received over $5 million in "profits" in addition to almost $2 million paid in management fees to AIC. The PNRRG board never authorized defendants to personally receive such profits. The "profits" were funds available because defendants had canceled the Sphere Drake contract, canceled coverage for physicians, and refused to pay claims. BCI, the company that was supposedly behind the reinsurance program, received no funds. These "profits" vastly exceeded the amount paid in claims.

No action was taken by the DOI when it discovered that defendants were canceling policies because O'Keefe promised Johnny Moore, the attorney for PNRRG's estate who was responsible for taking action, that he would use his political

influence to help Moore retain his position, and that Moore could use over $500,000 placed in trust with Moore as part of the reinsurance agreement. Moore and O'Keefe had negotiated the reinsurance contract. Moore is a private attorney who had been hired by the DOI to represent it in the conservation and liquidation of PNRRG. He took over $500,000 held in trust for personal use and pleaded guilty to a state bribery charge and a federal mail fraud count. In a recorded conversation, O'Keefe urged Moore not to reveal that he had taken the money.

To be sure, some of the evidence recited above was disputed. Nevertheless, we conclude that this evidence is sufficient to support the conspiracy convictions, in that a rational jury could find under this evidence that Schmidt, O'Keefe, O'Brien, and Bennett engaged in a fraudulent scheme to surreptitiously siphon off millions of dollars in PNRRG assets. Defendants make numerous sufficiency arguments which we find unavailing.

O'Keefe argues that under Neder v. United States, 527 U.S. 1 (1999), decided after the trial, the Court held that mail and wire fraud statutes require that the misrepresentation or concealment concern a material fact, id. at 20-25, and that in the pending case any misrepresentations or omissions were not material. The jury was not instructed on the element of materiality, a matter discussed further below, but here we reject O'Keefe's argument that the evidence is insufficient to establish that defendants made material misrepresentations and omissions. In general, a false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the party to which it was addressed. Id. at 16. The government's theory, supported by the evidence, was that defendants hatched a scheme to steal the assets of PNRRG.

To this end, defendants misrepresented or failed to disclose material facts discussed above. For example, they misrepresented that coverage of PNRRG's physicians would continue and that all claims would be paid by BCI, misrepresented that they would not personally profit from the transactions, failed to disclose that they had canceled excess coverage, and failed to disclose their plan to transfer millions of dollars intended to capitalize the new insurance venture to their personal bank accounts. One government witness, DOI actuary Scruggs, testified that if the DOI had known what the defendants were going to cancel doctors' coverage, it would not have entered into the reinsurance agreement with defendants and would have saved $8 million for the company in liquidation. We think these misrepresentations and nondisclosures were certainly capable of influencing the PNRRG board and the DOI.

Appellant Bennett devotes his appeal to sufficiency of the evidence, and presents an alternative version of events that is completely at odds with the government's theory of the case. Briefly, he argues as follows. Professionals at the DOI, on the advice of numerous outside professionals, had agreed on the plan in which the defendants participated. Under this plan, some of the low risk doctors insured by PNRRG were to be separated into a new company, and some of PNRRG's assets were to be transferred to this new company. This idea actually came from an insurance expert from Missouri, William O'Bryan, whom the DOI had sought out. BCI was intended to serve only as a temporary place to "park" the insurance policies of the low risk doctors until a permanent American company could be found. An estimate was made of how much cash was needed to capitalize this new company, based on complex risk assumptions. Contracts were signed, and the defendants operated within the confines of these agreements.

The defendants received a large profit not because of fraud, but only because the anticipated claims were higher than the actual claims, and there was no contractual provision for the return of profits to the DOI or the estate of PNRRG. No one, including defendants, had anticipated the windfall. Moore was a thief who stole money from an attorney trust account, and testified against the defendants for a reduction in sentence. Donaldson was caught misrepresenting his authority to act for BCI and entered into a plea bargain. He lied to the FBI and again in federal court, resulting in the new trial granted by Judge Sear. AIC was a legitimate company responsible for all the administration of the claims and policies. BCI did not have the capacity to perform such functions. The profits of AIC were personal profits of defendants O'Brien, Schmidt, and Bennett because AIC was a subchapter S corporation under the tax laws, and all income to such a corporation was taxable to the owners. The owners paid taxes and then used the remainder to capitalize Lemé Reinsurance Limited, a company formed to provide permanent coverage for the physicians.

While Bennett's version of events is not wholly implausible, we note that much of his argument is made without citation to the record. In any event, the evidence described above is more than sufficient to uphold the jury verdict. Donaldson and Moore were extensively cross-examined, and the jury was entitled to weigh their credibility.

The jury is the final arbiter of the credibility of witnesses. See United States v. Restrepo, 994 F.2d 173, 182 (5th Cir. 1993). A guilty verdict may be sustained if supported only by the uncorroborated testimony of a coconspirator, even if the witness is interested due to a plea bargain, unless the testimony is incredible or insubstantial on its face. See United

States v. Gadison, 8 F.3d 186, 190 (5th Cir. 1993); United States v. Hernandez, 962 F.2d 1152, 1157 (5th Cir. 1992). Testimony is incredible as a matter of law only if it relates to facts that the witness could not possibly have observed or to events which could not have occurred under the laws of nature. See Gadison, 8 F.3d at 190; United States v. Hoskins, 628 F.2d 295, 297 (5th Cir. 1980). Insofar as Donaldson lied to the FBI and in court (which the government disputes), those lies were rejected as a ground for a new trial in O'Keefe I. A rational jury could conclude that Moore, the attorney who was supposed to regulate defendants, was bribed or at least encouraged by O'Keefe to raid his trust account.

Given the totality of the evidence presented, a rational jury simply was not required to accept Bennett's explanation on appeal for why millions of dollars ended up in his personal bank account and the accounts of other defendants. The assets of PNRRG were placed with BCI in a trust account in the United States, yet over $5 million in "profits" was funneled through the Bahamas and back to the United States in transactions the jury could have found fraudulent. There was evidence that defendants had represented that there would be no profits, and that they concealed the agreement between BCI and AIC. Though defendants including Bennett claim the contractual arrangement between BCI and AIC was disclosed, there was ample evidence to the contrary. The jury could have reasonably concluded that defendants were able to secure "profits" from an insolvent insurer only because reinsurance from an established company was canceled, claims were not paid, and coverage for the insured physicians was not renewed. In the words of Judge Sear, the defendants' profit reversion "was connected by the defendants." Bennett insists that BCI had a contractual right to terminate the reinsurance coverage with Sphere Drake, and that canceling the coverage was

legitimate when claims that came in were smaller than expected, especially since the cost of the Sphere Drake coverage was very high. However, the district court concluded that "a reasonable jury could have found that the defendants created a false impression that Sphere Drake was covering the risks when, in fact, the contract was canceled and the defendants received substantial profits realized by the cancellation."

O'Brien and Bennett argue that certain testimony, such as testimony concerning which claims BCI was supposed to cover, are contradicted by the terms of the PNRRG/BCI written contract of reinsurance and are therefore inadmissible under the parol evidence rule. They cite no federal law that a criminal wire or mail fraud conviction cannot rest on misrepresentations that are inconsistent with the final written terms of an agreement. We see no merit to this argument.

2. Other Counts

The convictions on counts 2 and 4-8 are mail and wire fraud convictions of the four defendants—O'Keefe, Schmidt, O'Brien, and Bennett-convicted on the count I conspiracy count. They relate to various mailings and wire communications "for the purpose of executing the scheme set forth above," i.e., the count 1 conspiracy. The convictions on counts 14-23 are money laundering convictions of these four defendants under 18 U.S.C. § 1956(a)(2)(A). These counts allege money wire transfers "with the intent to promote the carrying on of specified unlawful activity, that is mail and wire fraud as set forth in Counts 2 through 13." The defendants argue that since they are all tied to the conspiracy count, they must fail if the conspiracy conviction is reversed, since there was no fraudulent scheme that will support them. These

defendants offer no independent reason why the evidence was insufficient on these other counts if, as we hold, the evidence is sufficient to support their convictions on count 1.

Schmitz challenges his mail fraud conviction on count 12. He was convicted solely on this count, and the other defendants were acquitted on this count. It alleged that "for the purpose of executing the scheme set forth above," i.e., the count 1 conspiracy, Schmitz sent a letter to Mark Wham, falsely stating that Schmitz was acting at the direction of the principals of Builders and Contractors Insurance, Ltd., a Bahamian Corporation, in offering a settlement for nuisance value, when the defendants had total control over disbursements of funds for the payment of claims. Wham was a personal injury lawyer with a claim against a physician who had coverage originally with PNRRG and whose coverage was transferred to BCI. Wham testified that Schmitz, acting as a claims manager, had pressured Wham to settle for nuisance value by telling Wham that he was dealing with a company out of the Bahamas with limited funds. Schmitz sent a letter as part of this negotiation. The government claims that Schmitz's conduct was fraudulent because he falsely stated in the letter that he was acting at the request of BCI, and he knew that there was money set aside in the United States to pay claims.

Ultimately the physician in question was forced to settle the case out of his own pocket and Wham received no fees. Judge Sear noted that Schmitz testified before the grand jury "that he did not and was not going to contact anyone at BCI and representations to this effect contained in the letter to Wham and others were not true."

We conclude that the evidence is sufficient to support Schmitz's mail fraud conviction on count 12. A rational jury could find that Schmitz's conduct was part of a scheme to stop paying claims and transfer the assets of PNRRG to defendants.

Schmitz's acquittal on the conspiracy count and the acquittal of the other defendants on count 12 does not help him. Even if the jury's verdict is inconsistent, and we are not persuaded that it is, such an inconsistency does not require reversal of his conviction. See United States v. Powell, 469 U.S. 57, 62 (1984); Dunn v. United States, 284 U.S. 390, 393 (1932). Both the interest and the appearance of justice are fully vindicated as long as the reviewing court assures itself, as we do, that regardless of an acquittal on some other count, the evidence is legally sufficient to support a guilty verdict on the count of conviction. See Powell, 469 U.S. at 66-69. Given "the Government's inability to invoke review, the general reluctance to inquire into the workings of the jury, and the possible exercise of lenity ... the best course to take is simply to insulate jury verdicts from review on this ground." Id. at 68-69.

B. Jury Charge and Response to Jury Question

1. Materiality Instruction

Defendants complain that the jury charge was flawed because it did not instruct the jury on the issue of materiality with respect to mail and wire fraud. As explained above, the Supreme Court held in Neder, decided after the trial of the pending matter, that materiality is a element under the wire and mail fraud statutes. As the government points out, there is some language in the jury instructions regarding materiality, such as the instructions that intent to defraud may be found

"from a material misstatement of fact made with reckless disregard of the facts," and that "[a] statement is or representation is 'false' within the meaning of the wire fraud and mail fraud statutes when it constitutes a half truth, or effectively conceals a material fact, provided it is made with intent to defraud." However, the jury charge did not plainly explain that materiality of falsehood is a separate element of the mail and wire fraud statutes. Defendants did not object to the trial court's failure to so instruct the jury.

The omission of the materiality element of the crime in the jury charge is subject to harmless error review if the defendant objected to the error. See Neder, 527 U.S. at 4-6. In the absence of an objection to the jury charge, however, the omission of the element is reviewed for plain error even if the law changed after the trial. See Johnson v. United States, 520 U.S. 461, 463-66 (1997). Under this limited review, there must (1) exist an error," (2) that is "plain," and that (3) affects the substantial rights of the defendant. Id. at 466-67. In discussing whether an error affected the defendant's "substantial rights," the Supreme Court explained that in most cases this means that the error "must have affected the outcome of the district court proceedings." United States v. Olano, 507 U.S. 725, 734 (1993). Even if these requirements are met, an appellate court may in its discretion correct a plain error only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Johnson, 520 U.S. at 467.

Defendants do not establish reversible error under the plain error standard. As discussed above, we conclude that the evidence would support a jury finding that the misrepresentations and omissions were in fact material. Defendants do not show that the inclusion of a materiality

instruction in the already complex charge would have altered the outcome of the jury's deliberations. While defendants put on a vigorous defense, the jury obviously accepted the government's theory that defendants schemed to fraudulently siphon off the assets of PNRRG from the inception of their dealings with PNRRG and the DOI. There was clear evidence of materiality.

2. Response to Jury Question

Schmitz complains of the district court's response to a jury question. During deliberations, the jury asked: "Can a defendant be found guilty of count 12 without knowingly furthering the scheme set forth in the indictment?" The court answered: "I cannot respond any better than I have in the charge which I gave you. Read it as it applies to this count."

A trial judge enjoys wide latitude in deciding how to respond to a question from the jury. See United States v. Stevens, 38 F.3d 167, 170 (5th Cir. 1994). We have explained that "[w]hen evaluating the adequacy of supplemental jury instructions, we ask whether the court's answer was reasonably responsive to the jury's question and whether the original and supplemental instructions as a whole allowed the jury to understand the issue presented to it." Id. Further, since Schmitz did not object to the court's supplemental instruction, our review is for plain error. See United States v. Rogers, 126 F.3d 655, 660 (5th Cir. 1997). We see no plain error. Schmitz does not show that the original charge was defective, so we fail to see how referring the jury back to the original charge could amount to plain error. Furthermore, the original charge answers the jury's question, since it plainly states that count 12 is based on a letter allegedly mailed on or about the date stated in the indictment "for the purpose of executing the scheme

charged in the indictment . . . ." The jury could find the answer to its question by reading the charge.

C. Indictment

Schmitz complains that the superseding indictment does not set out the substantive offenses in counts 2-23 with sufficient particularity. We review de novo questions of the sufficiency of the indictment. See United States v. Cabrera-Teran, 168 F.3d 141, 143 (5th Cir. 1999). The government points out that this objection was not made until after trial, but challenges based on the failure to charge an offense may be made at any time. See United States v. Fitzgerald, 89 F.3d 218, 221 (5th Cir. 1996). We have however found that review is morelimited if there was no objection until after the trial began, agreeing with other circuits that in such circumstances "indictments are liberally construed in favor of validity where they are tardily challenged." United States v. Green, 964 F.2d 365, 374 (5th Cir. 1992).

An indictment is sufficient when it (1) contains the elements of the offense charged, (2) fairly informs the defendant of the charges he must meet, and (3) there is no risk of future prosecutions for the same offense. See United States v. Arlen, 947 F.2d 139, 144 (5th Cir. 1991). In assessing the sufficiency of an indictment, we focus on practical, not technical, considerations. See United States v. Chaney, 964 F.2d 437, 446 (5th Cir. 1992).

Schmitz does not establish that the indictment is defective under these standards. He complains that the substantive counts only incorporated paragraph B of count 1 and failed to incorporate paragraph C of the same count. We see no merit to this argument. Paragraph C was not incorporated because it

listed numerous overt acts which would not have made sense if included in each separate substantive count. Each substantive count, alleges that specified defendants "for purposes of executing the scheme set forth above," committed specific overt acts in violation of the wire, mail, or money laundering statutes. Defendants were fairly informed of the charges.

D. Admission of Prior Convictions

O'Keefe complains that the district court erred in admitting evidence of his two prior fraud convictions. Other defendants also complain that they were prejudiced by this evidence. Schmidt complains that he was particularly prejudiced because he is O'Keefe's son-in-law. The only evidence of the prior convictions was the judgments of conviction themselves, and the district court instructed the jury to limit its consideration of the prior convictions to the issue of O'Keefe's intent.

The government and O'Keefe disagree on whether a proper objection was made below. We assume without deciding that a timely objection was made. Assuming such an objection, admission of prior bad acts evidence under Fed. R. Evid. 404(b) is reviewed for clear abuse of discretion. See United States v. Guerrero, 169 F.3d 933, 943 (5th Cir. 1999).

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." This court has established a two-prong test that governs the admissibility of Rule 404(b) evidence. First, the evidence must be relevant to

an issue other than the defendant's character. Second, the probative value of the evidence must not be substantially outweighed by its undue prejudice and the evidence must meet the other requirements of Rule 403. See United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc).

The district court applied this test, and in so doing analyzed the similarity of the prior and charged offenses. It did not clearly abuse its discretion in admitting the convictions as evidence of intent. We have frequently held that prior convictions are admissible under Rule 404(b) to prove intent, particularly in conspiracy cases. See United States v. Prati, 861 F.2d 82, 86 (5th Cir. 1988); United States v. Henthorn, 815 F.2d 304, 308 (5th Cir. 1987). "[I]n a conspiracy case the mere entry of a not guilty plea raises the issue of intent sufficiently to justify the admissibility of extrinsic act evidence." Prati, 861 F.2d at 86. As we explained in United States v. Roberts, 619 F.2d 379 (5th Cir. 1980), evidence of a prior conviction is admissible to prove intent in a later conspiracy case involving the same criminal activity, given the unique difficulties in proving intent in a conspiracy case:

> Charges of conspiracy involve considerations not present in other criminal prosecutions. . . . Unequivocal evidence that a defendant committed a substantive offense may justify the inference that he intended to do so, but it does not plainly support the conclusion that he agreed and planned with others to commit the crime. Evidence of a defendant's association and dealings with a group of conspirators, even when he knows they intend to commit a crime, does not alone show that he himself had the requisite intent to join the conspiracy. In every

> conspiracy case, therefore, a not guilty plea renders the defendant's intent a material issue and imposes a difficult burden on the government. Evidence of such extrinsic offenses as may be probative of a defendant's state of mind is admissible unless he affirmatively takes the issue of intent out of the case.

Id. at 382-83 (brackets, citation, quotation marks omitted).

O'Keefe cites United States v. Brown, 71 F.3d 1158 (5th Cir. 1995), in which we reversed a conviction for possession of cocaine with intent to distribute. The defense had put on one defense witness, and the prosecutor asked her whether she was aware of the defendant's prior drug conviction. Brown is distinguishable because it was not a conspiracy case and the government conceded that the prior conviction was admissible, if at all, as probative only on the issue of the defendant's identity. We held that the prior conviction was not probative on the issue of the witness' identification, and that the district court had erroneously instructed the jury. See id. at 1162-63. In the pending case the prior convictions were admitted to prove intent, a purpose we have sanctioned in conspiracy cases, as discussed above, and the jury was properly instructed.

E. Severance Motion

Schmidt complains that the district court erred in denying his motion for severance. He argues that he moved for severance after he learned that the government intended to introduce O'Keefe's prior convictions. He also complains in his brief that "[t]he spillover effect of the connection between

O'Keefe and Donaldson and O'Keefe and Moore presented a direct threat to Schmidt at trial."

The district court's denial of a motion to sever is reviewed for an abuse of discretion. See United States v. Pena-Rodriguez, 110 F.3d 1120, 1128 (5th Cir. 1997). To demonstrate an abuse of discretion, the defendant "bears the burden of showing specific and compelling prejudice that resulted in an unfair trial and such prejudice must be of a type against which the trial court was unable to afford protection." Id. (quoting United States v. Faulkner, 17 F.3d 745, 759 (5th Cir. 1994)). We have further noted that "[t]he rule, rather than the exception, is that persons indicted together should be tried together, especially in conspiracy cases," and that "the mere presence of a spillover effect does not ordinarily warrant severance." United States v. Pofahl, 990 F.2d 1546, 1483 (5th Cir. 1983).

We have stated that "acquittals as to some defendants on some counts support an inference that the jury sorted through the evidence and considered each defendant and each count separately." United States v. Ellender, 947 F.2d 748, 755 (5th Cir. 1991). In this case all the defendants were acquitted on one or more counts. We have further noted that appropriate instructions can reduce the possibility that the jury will improperly transfer proof of guilt from one defendant to another. Id. at 755. Instructions to consider separately each count and the evidence pertaining to it, and to give separate consideration to the evidence as to each defendant, have been held sufficient to eliminate the possibility of undue prejudice. See Faulkner, 17 F.3d at 759. In the pending case the jury was given standard instructions to consider separately the evidence as to each defendant.

The district court did not abuse its discretion in denying the motion for severance.

F. New Trial Motion Relating to Donaldson

Defendants moved for new trial based on newly discovered evidence concerning Donaldson. They argue that they discovered at sentencing, for the first time, that the government consented to Donaldson's use of $45,000 to pay court-ordered restitution of $150,000. The $45,000 was allegedly fends that remained in Donaldson's lawyer trust account. They claim that this information is impeachment evidence under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), and therefore should have been disclosed by the prosecution. They also claim that the failure to provide this information gave a false impression, since the plea agreement stated that there were "no other promises or inducements" to Donaldson.

Generally, we review the denial of a motion for new trial based on newly discovered evidence exclusively for abuse of discretion. Such motions are disfavored and are reviewed with great caution. In order to merit a new trial, the defendant must prove that (1) the evidence is newly discovered and was unknown to him at the time of trial, (2) the failure to discover the evidence was not due to his lack of diligence, (3) the evidence is not merely cumulative, but is material, and (4) the evidence would probably produce an acquittal. See United States v. Jaramillo, 42 F.3d 920, 924 (5th Cir. 1995).

To establish a Brady claim, the defendant must show that the government suppressed evidence favorable to him. See United States v. Ellender, 947 F.2d 748, 756 (5th Cir. 1991). The prosecution is not obligated to produce evidence or

information already known to the defendant, or that could be obtained through the exercise of reasonable diligence. See Brown v. Cain, 104 F.3d 744, 750 (5th Cir. 1997). In the pending case the government argues that defendants were aware of the $45,000 because it originated with O'Brien, and denies that there was any "secret deal" whereby the government consented to use of the $45,000 to pay the restitution order. According to the government, the sentencing judge simply became aware of it and ordered its payment to victims.

Assuming without deciding that the government suppressed evidence, a Brady violation only occurs when the government suppresses material evidence, including impeachment evidence, favorable to the accused. See Giglio, 405 U.S. at 154; Brady, 373 U.S. at 87. Such evidence is material if there is a reasonable probability that the outcome of the trial would have been different if the evidence had been disclosed. See United States v. Bagley, 473 U.S. 667, 682 (1985). Bagley established that even a direct, undisclosed payment to a witness is not a reversible per se Brady violation, if the court finds under the materiality requirement that the defendant has not shown a reasonable probability that the result of the trial would have been different if the evidence had been disclosed. See id. at 671-72, 682.

The district court did not err in denying a new trial based on Donaldson's alleged use of funds from his lawyer's trust account to make restitution. Donaldson told the jury of his conviction and was extensively cross-examined. The jury was well aware that he was testifying in hopes of leniency. Donaldson's credibility on the stand was the subject of O'Keefe I. We noted, in reversing an order for new trial, that Donaldson had been subjected to "devastating cross-

examination," and that "given the degree of impeachment of Donaldson on the stand, any further impeachment of the type that the defense now desires would merely have been cumulative." 128 F.3d at 896-97. We also noted that "the testimony of Donaldson was overwhelmingly corroborated by other witnesses." Id. at 897. For these same reasons, defendants are not now entitled to a new trial on similar grounds. While Donaldson was an important witness, whether he was allowed to pay restitution from a trust account strikes us as a relatively minor matter. Defendants have not shown a reasonable probability that the outcome of the trial would have been different if this evidence had been disclosed.

O'Keefe also complains that the district court erred in denying his request for an evidentiary hearing on the new trial motion. Denial of a hearing on a motion for new trial is reviewed for abuse of discretion. See United States v. MMM Corp., 954 F.2d 1040, 1046 (5th Cir. 1992). We see no abuse of discretion. Assuming that O'Keefe's factual allegations regarding this point are entirely accurate, he did not show that he was entitled to a new trial.

O'Keefe separately argues that the prosecution concealed its "active efforts" to hide Donaldson's false statements. While characterizing this claim as one of newly discovered evidence, this argument strikes us at least in part as a rehash of questions raised in O'Keefe I, namely, whether Donaldson falsely accused O'Keefe of altering certain corporate minutes and whether the government suppressed its knowledge of the false statement. Our earlier panel has already ruled that Donaldson's false statements did not entitle defendants to a new trial. O'Keefe argues that there was some kind of a secret agreement that the government would not prosecute

Donaldson for his perjury, but he offers nothing but conjecture that such an agreement existed.

G. New Trial Motion Relating to Moore

O'Keefe argues that after the trial, in civil cases arising out of the liquidation of PNRRG, Moore's counsel filed a statement taking the position that the DOI owed Moore $400,000 in legal fees, and therefore his use of $400,000 of the $527,000 in his trust account was legitimate. The district court denied the motion for new trial based on this alleged newly discovered evidence. At the trial, defendants cross-examined Moore and he testified that he had taken the position that he had spent the money from the trust account because his legal bills had not been paid. Hence, the evidence was not newly discovered and it came out at the trial. In any event, even if Moore changed his story, and now claims that he stole less PNRRG money than he told the jury, defendants do not show that the alleged newly discovered evidence would probably produce an acquittal. See United States v. Jaramillo, 42 F.3d 920, 924 (5th Cir. 1995).

O'Keefe also claims that at trial Moore testified that money in the trust account was BCI's money, while in the later civil proceeding he claimed that the funds belonged to the PNRRG estate. There is trial testimony where Moore stated, on cross-examination, that the money he held in trust belonged to BCI, because it had been transferred to BCI "for me to hold until such time as the accounting was made." So again there is no newly discovered evidence. Further, O'Keefe does not explain convincingly why it matters whether the funds were held in trust for BCI or PNRRG.

This evidence, even if newly discovered, does not change the fundamental facts that Moore admitted he stole money from his trust account with O'Keefe's blessing, and had pleaded guilty to such and was testifying pursuant to a plea agreement. The district court did not abuse its discretion in denying a new trial.

O'Keefe also complains that the district court erred in denying a hearing on this motion, but again, assuming that O'Keefe's factual allegations regarding this point are accurate, he did not show that he was entitled to a new trial.

H. Due Process Claim Regarding District Court's Rulings Following Remand

Schmidt raises a due process argument. As we understand it, he argues first that Fifth Circuit erroneously restricted the district court from considering Brady questions which were raised in the district court but were not addressed in the O'Keefe I appeal, and argues second that even if the Fifth Circuit did not so err, the district court erroneously interpreting our rulings as prohibiting it from considering these Brady questions. The only alleged Brady violations about which appellants complain in the pending appeal are discussed above.

We first disagree with any suggestion that our prior rulings prohibited the district court from considering these Brady questions. In O'Keefe I we remanded the case to the district court for consideration of those grounds for new trial which the district court had not yet reached. 128 F.3d at 899. In a later mandamus proceeding in this court brought by the government, we granted certain mandamus relief, but made clear that our order "does not deal with the motion for new

trial based on newly discovered evidence, which is not before this court."

The district court duly ruled on the motions for new trial which were before it after remand. For the reasons explained above, the district court did not err in denying the new trial motions.

I. Cumulative Error

O'Keefe argues that the cumulative effect of all the district court's errors warrants reversal. We have recognized that a conviction may be reversed for cumulative errors, regardless of "whether any one of the errors standing alone would be sufficient to justify reversal." United States v. Riddle, 103 F.3d 423, 435 (5th Cir. 1997). For the reasons discussed above, O'Keefe has not demonstrated cumulative trial errors which would justify a reversal under the cumulative error doctrine.

J. Enhancement of O'Brien's Sentence for Special Skills

O'Brien complains of the sentence enhancement he received for use of a special skill under U.S.S.G. § 3B1.3. This enhancement applies to one who "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." Application note 3 states that a special skill "refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts."

O'Brien argues that there was no proof that he used his special skills "in a manner that significantly facilitated the commission or concealment of the offense" under the guideline. "The government generally must prove factors for enhancement of sentencing by a preponderance of the evidence." United States v. Canada, 110 F.3d 260, 263 (5th Cir. 1997). Whether O'Brien used his special skills is a question of fact. We accept the district court's fact findings regarding sentencing unless they are clearly erroneous. See 18 U.S.C. § 3742(e). "A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole." United States v. Krenning, 93 F.3d 1257, 1269 (5th Cir. 1996). A district court's finding of fact will be deemed clearly erroneous only if we are left with the definite and firm conviction that a mistake has been made. See United States v. Graves, 5 F.3d 1546, 1556 (5th Cir. 1993). This court examines the district court's factual finding regarding sentencing for clear error and affords great deference to the court's application of the guidelines to its factual findings regarding sentencing. See United States v. Snell, 152 F.3d 345, 346 (5th Cir. 1998).

The enhancement rested on the presentence report (PSR) and the court's finding that O'Brien was a MBA, a CPA, and a certified underwriter with experience in the insurance industry. Initially, the PSR found that O'Brien "used his extensive skills in business, insurance and accounting to facilitate the commission of the offense." In an addendum, the probation officer added that by O'Brien's own admission in a pleading he searched for a stop-gap insurer, worked toward establishing a doctor-controlled pool, rejected certain companies, contacted a broker in the Bahamas and worked Sphere Drake into the agreement. He also testified that he "was in charge of operations" at PNRRG. There was evidence that it was

O'Brien who recommended canceling Sphere Drake, and that he drafted or at least worked on the BCI/AIC contract, the secret contract that allowed the defendants to siphon off the "profits" of the BCI/PNRRG reinsurance agreement. The district court did not clearly err in imposing this sentencing enhancement.

K. Cross-Appeal on Sentencing

The government cross-appeals, arguing that the district court erred in failing to find that the victims were particularly vulnerable, and in calculating loss figures used for restitution that were too low.

The government argues that injured patients were vulnerable victims under U.S.S.G. § 3A1.1(b)(1). The district court reasoned that the "victims" were physicians who "were exposed to claims for medical malpractice for which they were not protected by insurance," rather than patients. "The determination that a victim is vulnerable is a factual finding which the district court is best suited to make." United States v. Burgos, 137 F.3d 841, 843 (5th Cir. 1998). We see no clear error. Patients became indirect victims of the fraud only if physicians were unable to obtain alternative insurance or cover the losses personally. The district court did not clearly err in concluding, in effect, that it could not hold that the defendants knew or should have known of such an indirect harm to patients. Further, while injured patients are certainly entitled to sympathy, it does not necessarily follow that they are "unusually vulnerable" under the guideline. See U.S.S.G. § 3A1.1 n.2.

On the loss calculation issue, the government argues that the district court should not have excluded about $4 million

that defendants invested in other insurance companies which ultimately failed. The district court ordered restitution of a little over $1 million from each defendant other than Schmitz. A district court's order imposing restitution is reviewed for abuse of discretion. See United States v. St. Gelais, 952 F.2d 90, 97 (5th Cir. 1992); see also United States v. Hughey, 147 F.3d 423, 436 (5th Cir. 1998) ("Once we have determined that an award of restitution is permitted by the appropriate law, we review the propriety of a particular award for an abuse of discretion.").

The district court was concerned that the $4 million did not benefit defendants; it was reinvested in other insurance companies that also failed and were seized by government officials. Schmidt claims, and the government does not dispute, that of the over $5 million that was initially transferred from the O'Keefe trust account to defendants, all of this money was either paid to the federal government in the form of income taxes or was seized by the Louisiana DOI. On this record we cannot say that the district court abused its discretion in limiting restitution as it did.

AFFIRMED.

APPENDIX B

U.S. COURT OF APPEALS
FILED
SEP 14 2000
CHARLES R. FULBRUDGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30082

UNITED STATES OF AMERICA

Plaintiff – Appellee-Cross-Appellant

v.

ERIC SCHMIDT; MICHAEL O'KEEFE SR;
JOHN O'BRIEN; GARY BENNETT

Defendant – Appellants-Cross-Appellees

PAUL SCHMITZ

Defendant – Appellant

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Appeals from the United States District Court for the
Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

(Opinion 8/11/00, 5 Cir., _____, _____ F.3d _____)

Before REAVLEY, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

(. .) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

Supreme Court, U.S.
FILED
FEB 13 2001

No. 00-896

In the Supreme Court of the United States

JOHN O'BRIEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 PP

QUESTION PRESENTED

Whether, when a court of appeals conducts plain-error analysis under Federal Rule of Criminal Procedure 52(b) of a claim of legal error that became clear only as the result of an intervening change in the settled law of the circuit, the defendant bears the burden of establishing that he was prejudiced by the error.

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In the Supreme Court of the United States

No. 00-896

JOHN O'BRIEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is unpublished, but the decision is noted at 229 F.3d 1148 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2000. A petition for rehearing was denied on September 14, 2000 (Pet. App. 32a-33a). The petition for a writ of certiorari was filed on December 1, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371 (Count 1); wire fraud, in violation of 18 U.S.C. 1343 (Counts 2, 4, 5-8); and money laundering, in violation of 18 U.S.C. 1956(a)(2)(A) (Counts 14-23). He was sentenced to 121 months' imprisonment, to be followed by a two-year term of supervised release, and was ordered to pay restitution in the amount of $1,174,849. 01-13-99 Judgment 1. The court of appeals affirmed. Pet. App. 1a-31a.

1. Petitioner and co-defendants Eric Schmidt, Michael O'Keefe, Sr., Gary Bennett, and Paul Schmitz engaged in a fraudulent scheme to siphon off millions of dollars in assets of Physicians National Risk Retention Group, Inc. (PNRRG), a Louisiana medical malpractice insurer.[1] O'Keefe, who had twice been convicted of fraud, was selected to operate Associated Auditors, the management company for PNRRG. Schmidt served as president of PNRRG. Petitioner and Bennett were also involved in the management of PNRRG, and Schmitz was a claims manager. Pet. App. 2a; Gov't C.A. Br. 7-8, 23.

PNRRG became insolvent, and the State of Louisiana moved to liquidate it. Petitioner and his co-defendants arranged to have Builders and Contractors Insurance Limited (BCI), a dormant Bahamian corporation, act as a reinsurer. The Louisiana Department of

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[1] Co-defendants O'Keefe, Schmidt, and Bennett were also convicted of conspiracy, mail fraud, wire fraud, and money laundering. Co-defendant Schmitz was convicted on a single count of mail fraud. Gov't C.A. Br. 4; see Pet. App. 2a.

Insurance and the Board of PNRRG approved the reinsurance agreement, based on the assurances of petitioner and his co-defendants that the reinsurance program would be backed by Sphere Drake, an established reinsurance company with assets in excess of $500 million; that coverage of PNRRG's physicians would continue; and that all future claims would be paid by BCI. Pet. App. 2a-3a; Gov't C.A. Br. 7-8, 23-24.

Based on the representations of petitioner and his co-defendants that the reinsurance program would require additional funding, PNRRG and the Louisiana Department of Insurance authorized the transfer of more than $10 million in cash assets of PNRRG to a trust account of O'Keefe's law firm, with the funds to be held on behalf of BCI. Petitioner and his co-defendants entered into a reinsurance contract with Sphere Drake. At petitioner's direction, however, they canceled the contract a few months later. Neither PNRRG nor the Louisiana Department of Insurance was advised of the cancellation. Petitioner and his co-defendants also canceled the insurance coverage of a large number of physicians before the expiration date, and they failed to pay claims for the insured physicians as promised. Pet. App. 3a; Gov't C.A. Br. 7-8, 24-26.

Associated Insurance Consultants, Inc. (AIC), a management company owned by petitioner, Schmidt, and Bennett, signed a management contract to handle the claims and carry out the terms of the reinsurance agreement on BCI's behalf. The insured physicians, the Board of PNRRG, and the Louisiana Department of Insurance were unaware of that management contract, which resulted in AIC's receipt of over $5 million in profits generated by the cancellation of the Sphere Drake contract, the early cancellation of the physicians' insurance coverage, and the failure to pay claims.

Ultimately, that money was diverted to the personal bank accounts of petitioner, Schmidt, and Bennett. Pet. App. 3a; Gov't C.A. Br. 25-26, 28-30.

A representative of the Louisiana Department of Insurance testified that the Department would not have entered into the reinsurance agreement if it had known that petitioner and his co-defendants intended to cancel physicians' insurance coverage. Pet. App. 10a; Gov't C.A. Br. 53. An attorney for the Department testified that in approving the reinsurance agreement with BCI, the Department sought a solvent insurer for the plan, and that the Department was not informed of the cancellation of the reinsurance contract with Sphere Drake. *Id.* at 54. Physician PNRRG board members similarly testified to their understanding, based on representations from petitioner and his co-defendants, that the agreement would protect doctors. *Ibid.* The physicians also testified that they were unaware of the profit diversion or the cancellation of the Sphere Drake reinsurance contract. *Ibid.*

2. The court of appeals affirmed the convictions of petitioner and his co-defendants. Pet. App. 1a-31a. During the pendency of the appeal in this case, this Court held in *Neder* v. *United States*, 527 U.S. 1 (1999), that materiality is an element of wire fraud under 18 U.S.C. 1343. On appeal, petitioner and his co-defendants contended that the district court had failed to submit the question of materiality to the jury and that the omission required reversal of their convictions.

The court of appeals agreed that the jury instructions had not clearly identified materiality as an essential element of the mail and wire fraud offenses. Pet. App.

15a-16a.[2] The court stated, however, that in the absence of a timely objection at trial, the omission of that element was reviewable only for plain error. *Id.* at 16a (citing *Johnson* v. *United States*, 520 U.S. 461, 463-466 (1997)). Under the plain-error standard, the court explained, an appellant must establish error that is "plain" and affects his "substantial rights." *Ibid.* "Even if these requirements are met," the court of appeals observed, "an appellate court may in its discretion correct a plain error only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Ibid.* (citing *Johnson*, 520 U.S. at 467). The court held that petitioner and his co-defendants had not established reversible error under that standard because

> the evidence would support a jury finding that the misrepresentations and omissions were in fact material. Defendants do not show that the inclusion of a materiality instruction in the already complex charge would have altered the outcome of the jury's deliberations. While defendants put on a vigorous

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[2] The court explained:

> As the government points out, there is some language in the jury instructions regarding materiality, such as the instructions that intent to defraud may be found "from a material misstatement of fact made with reckless disregard of the facts," and that "[a] statement * * * or representation is 'false' within the meaning of the wire fraud and mail fraud statutes when it constitutes a half truth, or effectively conceals a material fact, provided it is made with intent to defraud." However, the jury charge did not plainly explain that materiality of falsehood is a separate element of the mail and wire fraud statutes. Defendants did not object to the trial court's failure to so instruct the jury.

Pet. App. 15a-16a.

> defense, the jury obviously accepted the government's theory that defendants schemed to fraudulently siphon off the assets of PNRRG from the inception of their dealings with PNRRG and the [Department of Insurance]. There was clear evidence of materiality.

Id. at 16a-17a.

ARGUMENT

Petitioner contends (Pet. 4-15) that the court of appeals erred in placing on him the burden of establishing prejudice from the district court's failure to instruct the jury on materiality. Petitioner asserts (Pet. 5) that the Court in *United States* v. *Olano*, 507 U.S. 725, 734 (1993), "expressly left open the question of which party bears the burden of persuasion when the defendant has committed no forfeiture and the appeal is based not on an error that the defendant could have objected to at trial, but on an error that was made clear only after trial by a change in the law." Petitioner urges the Court to grant certiorari to resolve that issue, which he contends (Pet. 14) "sharply divides" the courts of appeals. Petitioner's claim does not warrant further review.

1. Federal Rule of Criminal Procedure 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In *Olano*, this Court explained that under Rule 52(b), a criminal defendant who fails to object to an alleged error at trial is entitled to relief on appeal only if he can make four distinct showings. The defendant must establish that the district court committed (1) an "error" (2) that was "plain," in the sense of "clear" or "obvious," and (3) that "affect[ed] [his] substantial rights." 507 U.S. at 732-735.

Under the third ("substantial rights") prong of the *Olano* analysis, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* at 734. Even when those showings are made, a reviewing court may exercise its discretion to reverse a conviction for plain error only "if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (internal quotation marks omitted).

In *Olano*, the government "essentially concede[d]" that the error in question—the presence of alternate jurors during jury deliberations in violation of Federal Rule of Criminal Procedure 24(c)—was "plain." 507 U.S. at 737. In concluding that the error satisfied the second prong of the "plain error" standard, the Court therefore was not required to "consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Id.* at 734. In *Johnson* v. *United States*, 520 U.S. 461, 468 (1997), the Court decided the question left open in *Olano*, holding that "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."

2. In *United States* v. *Viola*, 35 F.3d 37, 41-42 (1994), cert. denied, 513 U.S. 1198 (1995), the Second Circuit relied on the above-quoted language from *Olano* in fashioning an exception to the general rule that the defendant bears the burden of establishing prejudice in a plain-error inquiry under Rule 52(b). The *Viola* court held that "[w]hen a supervening decision alters settled law, the three *Olano* conditions for reviewing plain error under Rule 52(b) still must be met, but with one crucial distinction: the burden of persuasion as to prejudice (or, more precisely, lack of prejudice) is borne by

the government, and not the defendant." 35 F.3d at 42;[3] see also *United States* v. *Malpeso*, 115 F.3d 155, 165 (2d Cir. 1997), cert. denied, 524 U.S. 951 (1998); *United States* v. *Ballistrea*, 101 F.3d 827, 835 (2d Cir. 1996), cert. denied, 520 U.S. 1150 (1997); *Napoli* v. *United States*, 45 F.3d 680, 683 (2d Cir.), cert. denied, 514 U.S. 1084 (1995). That holding is incorrect and has been effectively superseded by this Court's decision in *Johnson*.

a. The Court in *Olano* did not leave open (or explicitly allude to) the question whether, in a plain-error inquiry under Rule 52(b), the burden of persuasion as to prejudice should shift to the government when a supervening decision alters settled law. Rather, the *Olano* Court noted (while declining to resolve) the distinct question whether an error is "plain" within the meaning of Rule 52(b) when the law is unsettled at the time of trial but the erroneous character of a district court ruling is clear by the time that the court of appeals decides the case. 507 U.S. at 734; see p. 7, *supra*. The Court later resolved that question in *Johnson*, holding that under those circumstances an error is "plain" for purposes of the second prong of Rule 52(b) analysis. 520 U.S. at 468; see p. 7, *supra*. Nothing in *Olano* suggests the existence of a "settled law" exception to the Court's facially unqualified holding that under Rule

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[3] The court in *Viola* acknowledged that a defendant who fails to assert a timely objection at trial "rightly bears the burden of proving prejudice in the ordinary case." 35 F.3d at 42. The court found, however, that "[t]he situation is different when a supervening decision alters settled law. A defendant clearly has no duty to object to a jury instruction that is based on firmly established circuit authority. He cannot be said to have 'forfeited a right' by not making an objection, since at the time of trial no legal right existed." *Ibid.*

52(b), "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." 507 U.S. at 734.

b. *Johnson* was decided after *Viola* and effectively supersedes *Viola*'s "settled law" exception to the generally applicable requirements of Rule 52(b). In *Johnson*, the district court, in accordance with existing circuit precedent, decided the issue of materiality in a perjury prosecution. 520 U.S. at 463-464. After Johnson was convicted, this Court issued its decision in *United States* v *Gaudin*, 515 U.S. 506 (1995), which held that the materiality of a false statement is a question for the jury. See 520 U.S. at 464. On appeal, Johnson argued that the district court's failure to submit the issue of materiality to the jury required reversal of his conviction. *Ibid.*

This Court held that, given the defendant's failure to assert a timely objection at trial, his challenge was reviewable for plain error under Rule 52(b). Applying the plain-error standard set forth in *Olano*, the *Johnson* Court held that the district court's failure to submit the question of materiality to the jury was error and that the error was plain. 520 U.S. at 467-468. The Court questioned whether the district court's error had affected Johnson's substantial rights. *Id.* at 468-469. The Court declined to resolve that issue, however, finding that in any event the error did not meet the final requirement of *Olano* because it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. See *id.* at 469-470.

Johnson thus makes clear that, even when a district court ruling accords with existing circuit precedent at the time of trial, a defendant who fails to assert a timely objection may obtain relief on appeal only if he can establish plain error under the standards set forth in

Olano. And, as *Olano* clearly provides, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." 507 U.S. at 734; see also *id.* at 741 ("Whether the Government could have met its burden of showing the absence of prejudice, under Rule 52(a), if respondents had not forfeited their claim of error, is not at issue here. This is a plain-error case, and it is respondents who must persuade the appellate court that the [error] was prejudicial.").

c. Contrary to petitioner's suggestion (Pet. 6-10, 14), no other circuit has adopted the modified plain-error rule embraced by the Second Circuit in *Viola*. In *United States* v. *Baumgardner*, 85 F.3d 1305, 1309 n.2 (1996), the Eighth Circuit noted the Second Circuit's holding in *Viola*. The Eighth Circuit declined to address the question, however, stating that "although we find the *Viola* analysis persuasive, we leave the issue of burden-shifting for another day." *Ibid.* The court's decision in *Baumgardner*, moreover, predates *Johnson*, which clarifies that the usual plain-error analysis applies in cases where the contested district court ruling is consistent with then-existing circuit precedent.

d. In light of this Court's decision in *Johnson*, it is questionable whether the Second Circuit will continue to adhere to *Viola*'s modified plain-error rule. In *United States* v. *Knoll*, 116 F.3d 994 (1997), cert. denied, 522 U.S. 1118 (1998), decided after *Johnson*, the Second Circuit rejected the defendant's claim that the trial court's pre-*Gaudin* failure to submit the issue of materiality to the jury in his perjury prosecution constituted plain error. Like this Court in *Johnson*, the Second Circuit in *Knoll* found that the first two prongs of *Olano* were satisfied, but declined to decide whether

the error affected the defendant's substantial rights, on the ground that there was no basis for finding that the materiality element was not met and the error therefore did not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." See *id.* at 1000-1002. The court declined to address the defendant's argument that *Viola*'s "modified" plain-error standard of review should apply in determining whether the third prong of *Olano* was met. *Id.* at 1001 ("There is no need for us to address this argument * * * because we resolve this appeal without reaching possible issues raised by the third prong of *Olano*."). Until the Second Circuit has either reaffirmed or disavowed the *Viola* standard in light of *Johnson*, review by this Court would be premature.[4]

3. Even if the question whether the defendant or the government bears the burden of persuasion in this context otherwise warranted this Court's review, the instant case would be an unsuitable vehicle for deciding it. The theory of the government's case was that petitioner and his co-defendants persuaded PNRRG and the Louisiana Department of Insurance to approve the reinsurance agreement and to authorize the transfer of more than $10 million in cash assets of PNRRG to a trust account with the funds to be held on behalf of BCI, based on the defendants' false assurances that the reinsurance program would be backed by Sphere Drake, that coverage of PNRRG's physicians would continue, and that BCI would pay all future claims. In defining "scheme to defraud," the district court's

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[4] In *United States* v. *Malpeso*, *supra*, decided less than one month after this Court's decision in *Johnson*, the Second Circuit applied *Viola*'s modified plain-error standard, without any discussion of *Johnson*. See 115 F.3d at 165.

instructions concerning the government's intangible rights offense allegation emphasized that a criminal breach of the employee's duty of loyalty may be found "when, with specific intent to defraud, the employee conceals or fails to disclose information which the employee has reason to believe would cause harm to the employer or would lead a reasonable employer to change its business conduct." 86 R.A. 127. The district court also instructed the jury that "[a] statement or representation is 'false' within the meaning of the wire fraud and mail fraud statutes when it constitutes a half truth, or effectively conceals a material fact, provided it is made with intent to defraud. To act with intent to defraud means to act with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self." *Ibid.* The court further instructed that "[s]pecific intent to defraud may also be found from a material misstatement of fact made with reckless disregard of the facts." *Id.* at 128. Thus, although "the jury charge did not plainly explain that materiality of falsehood is a separate element of the mail and wire fraud statutes," Pet. App. 16a, the district court's instructions adequately ensured that petitioner and his co-defendants would not be convicted of mail or wire fraud based on false statements having no natural capacity to influence the conduct of PNRRG or the Louisiana Department of Insurance.

Indeed, despite petitioner's contrary assertion (Pet. 13, 14), materiality was not seriously contested at trial. Petitioner and his co-defendants did not dispute that their activities were capable of influencing the Insurance Department and the insured physicians. Rather, their defense was one of good faith—that their diversion of millions of dollars was legitimate business con-

duct, undertaken not with intent to defraud, but for a legal purpose. See Gov't C.A. Br. 55-56.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2001

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[5] Petitioner states (Pet. 13) that "[t]he court below found that, with specific reference to the issue of materiality, the 'defendants put on a vigorous defense.'" The court, however, did not find that petitioner and his co-defendants put on a vigorous defense as to materiality. Rather, in context, it is clear that the court was finding that petitioner and his co-defendants had put on a vigorous defense of good faith:

> Defendants do not show that the inclusion of a materiality instruction in the already complex charge would have altered the outcome of the jury's deliberations. While defendants put on a vigorous defense, the jury obviously accepted the government's theory that defendants schemed to fraudulently siphon off the assets of PNRRG from the inception of their dealings with PNRRG and the [Department of Insurance]. There was clear evidence of materiality.

Pet. App. 16a-17a.

(3)

Supreme Court, U.S.
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No. 00-896

In the
Supreme Court of the United States

JOHN O'BRIEN,
Petitioner

v.

THE UNITED STATES,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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PETITIONER'S REPLY BRIEF

1. In *United States v. Olano*, 507 U.S. 725 (1993), this Court noted, but did not decide, the question whether the government or the defendant bears the burden of proof as to prejudice when the error complained of was unclear at the time of trial but became plain on appeal due to a change in the applicable law. In the Court's words, "*Normally, although perhaps not in every case,* the *defendant* must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)." *Id.* at 735 (emphasis added).

In its Brief in Opposition ("U.S.Br."), the government never discusses this passage from *Olano*. Instead, the government focuses on a different question left open by *Olano*: whether the "plainness" of an error under Rule 52(b) is to be judged under the law at the time of appeal, even if the law has changed since the time of trial. 507 U.S. at 734. *That* question, as the government notes (U.S.Br. 8), was resolved in *Johnson v. United States,* 520 U.S. 461 (1997).

But the *Johnson* Court expressly declined to decide whether prejudice from the error had been shown, and it therefore had no occasion to address the question presented here: which party bears the burden of persuasion on prejudice when the defendant has committed no forfeiture and the appeal is based not on an error to which the defendant could have objected at trial, but on an error that was made clear only after trial by a change in the law. The Court found it unnecessary to reach those questions — which, as here, involved the failure of the court to instruct on the issue of materiality — because in *Johnson* the question of materiality was "uncontroverted at trial and . . . on appeal" and the evidence supporting materiality was "overwhelming." 520 U.S. at 469-70.

Thus, it is indisputable that this Court has not resolved the question presented. That question has, however, been the subject

of contention in the courts of appeals, and they have treated the question as unresolved by this Court's decisions and have reached conflicting holdings on the issue. Compare *United States v. Viola*, 35 F.3d 37, 41-42 (2d Cir. 1994), *cert. denied*, 513 U.S. 1198 (1995), and its progeny, and *United States v. Baumgardner*, 85 F.3d 1305, 1309 n. 2 (8th Cir. 1996), with *United States v. Kramer*, 73 F.3d 1067, 1074 n.17, 1078 (11th Cir.), *cert. denied*, 519 U.S. 1011 (1996), and the decision below (all discussed in the Petition 4-12).

The government contends that this split within the circuits on an important issue — the government never actually contests the importance of the question presented — need not concern this Court because the longest line of circuit authority, the Second Circuit line of cases beginning with *Viola,* "is incorrect." U.S.Br.8. But the government's firm disagreement *on the merits* with the leading line of authority on the question presented argues for, not against, a grant of certiorari.

The government expresses the hope that the Second Circuit will, someday, see the light and renounce its modified plain error rule. U.S.Br.10-11. But, once again, the government's preferences with respect to the merits of the question presented do not negate the existence of a circuit conflict on the issue, nor do they constitute reasons for denying the petition. Furthermore, the government's obituary for *Viola* is, like the original reports of Mark Twain's death, rather premature. For the Second Circuit was reaffirming *Viola* even as the government was opining that the case is moribund:

> When the source of the alleged error is a supervening judicial decision that alters "a settled rule of law in the circuit," as Santiago alleges, we apply a "modified plain error rule" in which the government bears the burden of persuasion as to whether substantial rights have been affected. *Viola*, 35 F.3d at 42.

United States v. Santiago, 2001 U.S. App. LEXIS 733 (2nd Cir. Jan. 19, 2001) at *7.[1] Although the decision was handed down nearly a month before the government filed its brief in opposition, the government inexplicably fails to mention *Santiago*.

For that matter, the government fails to mention other post-*Johnson* cases in which the Second Circuit adhered to *Viola*'s construction of Rule 52(b). For example, in *United States v. Gore,* 154 F.3d 34 (2nd Cir. 1998), the court noted that the defendant had forfeited the legal error at issue by failing to make a timely objection at trial. *Id.* at 42. The Court of Appeals ruled that, because the error "was 'plain' under current law at the time of his trial," under the rule announced in *Viola* defendant would bear the burden of showing he had been prejudiced. *Id.* at 42 (citing *Viola*, 35 F.3d at 41). In *United States v. Feliciano*, 223 F.3d 102 (2nd Cir. 2000), the court noted that defendant had failed to raise an objection at trial to the failure to give a particular jury instruction, *id.* at 114-15, and therefore, in accord with the *Viola* rule, defendant would bear the burden of demonstrating prejudice from this error. *Id.* at 115 (citing *Viola*, 35 F.3d at 41, and *Gore*, 154 F.3d at 42). In each case, the Court of Appeals quoted and relied upon this Court's decision in *Johnson*, *see Gore*, 154 F.3d at 42; *Feliciano*, 223 F.3d at 111, 115, but apparently failed to discern any conflict between that decision and the *Viola* rule. Petitioner submits that this is because there is no conflict, insofar as *Johnson* simply had no occasion to address the question presented here (as explained *supra* at page 1).

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[1] In accord with the modified plain error rule, appellant Santiago was required to bear the burden of proving he had been prejudiced because, in contrast to the situation here, the legal error he appealed had been plain at the time of trial yet he had failed to object. 2001 U.S. App. LEXIS at *7.

2. The government's brisk assertion that the *Viola* rule is incorrect is a bit presumptuous, given (1) that the government *never disputes* the Petition's arguments in favor of placing the burden as to prejudice on the government in these circumstances, and (2) that the Petition's arguments, and the circuit court holdings on which they rest, are congruent with a principle that this Court itself approved in *Johnson*.

Rule 52(b) was "designed to encourage a defendant to raise objections during the proceeding where they might be corrected, rather than strategically to withhold an objection as a basis of appeal." *Baumgardner*, 85 F.3d at 1308. But "[w]hen the source of plain error is a supervening decision, the defendant has not been derelict in failing to object at trial, and there is thus no cause to shift the burden of proving prejudice to the defendant." *Viola*, 35 F.3d at 42; *United States v. Ballistrea*, 101 F.3d 827, 835 (2d Cir. 1996), *cert. denied*, 520 U.S. 1150 (1997) (same). A construction of Rule 52(b) requiring defendants to "raise all possible objections at trial despite settled law to the contrary would encourage frivolous arguments, impeding the proceeding and wasting judicial resources." *Baumgardner*, 85 F.3d at 1309. *See also Viola*, 35 F.3d at 42 (same); *United States v. Malpeso*, 115 F.3d 155, 165 (2d Cir. 1997) (same).

This Court in *Johnson* embraced precisely the same logic, and criticized the very same perverse incentive, when deciding the related question of whether plain error is to be assessed as of the time of the appeal. The government had argued that "petitioner should have objected to the [trial] court's deciding the issue of materiality, even though near-uniform precedent both from this Court and from the Courts of Appeals held that course proper." *Johnson*, 520 U.S. at 467-68. This Court flatly disagreed: "such a rule would result in counsel's inevitably making a long and virtually useless list of objections to rulings that were plainly supported by existing precedent." 520 U.S. at 468.

3. Unwilling (and perhaps unable) to answer the Petition's arguments about why the question presented is important and why the decision below is in error, the government contends that this case is not a sound vehicle for deciding the question presented. The Petition explained that this case is an attractive vehicle for resolving the question of who should bear the burden of proof as to prejudice when the trial court fails to instruct the jury on materiality, because materiality was contested both at trial and on appeal, and the placement of the burden of persuasion as to prejudice on the petitioner may therefore have been decisive. Pet. 13-14. The government disagrees on two grounds, both of which misrepresent the proceedings below and flatly contradict the Fifth Circuit's own *factual* determinations.

First, the government contends that adequate instructions on materiality were given by the trial court. U.S.Br. 12. This is, at best, mere caviling. As the government concedes, U.S.Br. 4, the Court of Appeals squarely held that the jury had not, in fact, been properly instructed on materiality. Pet.App. 15a-16a. The contrary assertions that the government rehashes in its brief here were the same ones made to, and rejected by, the court below. *See* Govt.C.A.Br. 50-52.

Second, the government asserts that materiality "was not seriously contested at trial." U.S.Br. 12. But, once again, the Court of Appeals found precisely the contrary: "defendants put on a vigorous defense" on "materiality." Pet.App. 17a. The government insists (U.S.Br. 13 n.5) that the court below was describing not defendants' materiality arguments, but a "good faith" defense. This is nonsense. The quoted passage is found in the section of the opinion that the Fifth Circuit titled "Materiality Instruction" (Pet.App. 15a), and the paragraph expressly refers to "evidence of materiality" whereas the

government's words "good faith" are nowhere mentioned. Pet.App. 17a.[2]

Hence, unlike the other cases in which this issue has been implicated, including *Johnson, see* Petition 13-14 & n. 3, here the issue of materiality was vigorously contested and therefore the trial court's failure to instruct on materiality, and the circuit court's placement on defendant of the burden of showing prejudice therefrom, may well have made a decisive difference in the outcome.

CONCLUSION

This problem of who should bear the burden on prejudice when the law changed after the trial, and the defendant therefore committed no procedural default, will reoccur in pending criminal appeals every time a rule of law is changed by an intervening appellate decision. A writ of certiorari is in order.

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[2] The government purports to prove that petitioner did not contest materiality below by citing not to petitioner's briefs or testimony or exhibits, but — strangely — to the government's own brief in the court below. U.S.Br. 13. But as the Fifth Circuit itself determined, Pet.App. 17a, petitioner put on a "vigorous" defense on materiality both at trial and on appeal. *See, e.g.*, Record Vol. 85 23-25; Defendant O'Brien's C.A.Br. 16-22; O'Brien's C.A. Reply Br. 5-15.

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